Remodeling by Oltmanns, Inc. *and* Carpenters Local Union No. 400, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Omaha Building Contractors Employers Association, Party to the Contract. Case 17-CA-9947

September 17, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 23, 1982, Administrative Law Judge Burton Litvack issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Remodeling by Oltmanns, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(f) and reletter the following paragraphs accordingly:

"(f) Expunge from its records and files any and all references to the unlawful discharges of employees Charles Hartline, Robert Cantwell, Bill Meeves, Virgil Guerra, and Harley Sedivey, and notify said employees, in writing, that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel action against them."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to recognize and bargain collectively, upon request, concerning rates of pay, wages, hours, and other terms and conditions of employment with Carpenters Local Union No. 400, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union, as the exclusive representative for purposes of collective bargaining for employees in the following appropriate unit:

All journeymen and apprentice carpenters, carpenter foremen, carpenter general foremen, carpenters working on Creosote or similar type material, carpenter sawmen, carpenter welders, pile drivers, pile driver foremen, millwrights, millwright foremen, and millwright general foremen employed by us at our jobsites and cabinet shop; excluding all office clerical and professional employees, guards, and supervisors as defined by the Act.

WE WILL NOT discourage membership in, or activities on behalf of, the Union by causing the discharge of employees who are members of the Union.

WE WILL NOT fail or refuse to make payments to the Union's health, welfare, pension, and other trust funds as we were required to do prior to June 4, 1980.

WE WILL NOT unilaterally, without notice to and bargaining with the Union, alter for the aforementioned employees any of the terms and conditions of employment in effect on June 6, 1980.

WE WILL NOT interrogate prospective employees as to their membership in the Union.

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[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We shall modify the recommended Order by incorporating a provision requiring Respondent to expunge from all its records and files any references to the unlawful discharges of employees Hartline, Cantwell, Meeves, Guerra, and Sedivey, and to notify said employees, in writing, that Respondent has taken such action and that evidence of the unlawful discharges will not be used as a basis for future personnel action against them. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL recognize and, upon request, bargain with the above-named labor organization as the exclusive representative of all the employees in the above appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, upon the Union's request, revoke any or all unilateral changes made effective by us on and after June 9, 1980, with regard to the wages, hours, and terms and conditions of employment of all employees in the above-described unit.

WE WILL give retroactive effect to all the terms and conditions of employment in effect on June 6, 1980, until such time that we and the Union execute a signed contract or reach good-faith impasse or the Union refuses to bargain in good faith.

WE WILL offer to employees Charles Hartline, Robert Cantwell, Bill Meeves, Virgil Guerra, and Harley Sedivey immediate and full reinstatement to their respective former positions of employment without loss of seniority or privileges, discharging, if necessary, other employees who may have been hired or assigned to perform their functions; or, if their former respective positions do not exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges.

WE WILL make whole the employees specified in the above paragraph and all unit employees hired on or after June 9, 1980, for any losses of pay, plus interest, each may have suffered, respectively, either as a result of the discrimination against them or because of our failure to apply to them the terms and conditions of employment in effect on June 6, 1980. No part of the Board's Order shall be construed as forcing or requiring us to subtract or withdraw any benefit or benefits heretofore granted to unit employees commencing June 9, 1980.

WE WILL expunge from our records and files any and all references to the unlawful discharges of employees Charles Hartline, Robert Cantwell, Bill Meeves, Virgil Guerra, and Harley Sedivey, and WE WILL notify these employees, in writing, that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel action against them.

WE WILL pay to the appropriate union trust funds the contributions required as of June 4, 1980, to the extent that such contributions have not been made or that the employees had not otherwise been made whole for their ensuing medical and other expenses, and continue such payments until we negotiate in good faith with the Union to an agreement or to good-faith impasse or until the Union refuses to bargain.

REMODELING BY OLTMANNS, INC.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge: This matter was heard before me in Omaha, Nebraska, on May 12 and August 12, 1981. On November 19, 1980, the Regional Director for Region 17 of the National Labor Relations Board, herein called the Board, issued a complaint and notice of hearing based on original and first amended unfair labor practice charges filed on October 2 and November 3, 1980, respectively, by Carpenters Local Union No. 400, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union, alleging that Remodeling by Oltmanns, Inc., herein called Respondent, engaged in acts and conduct violative of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an answer, denying the commission of any unfair labor practices. All parties have been afforded a full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, and to file post-hearing briefs which have been carefully examined. Based on the entire record, the post-hearing briefs,[1] and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a State of Nebraska corporation, is engaged in the building and construction industry with a facility located in Omaha, Nebraska. In the course and conduct of its business operations, Respondent annually purchases goods and services valued in excess of $50,000 from sources located within the State of Nebraska, which sources, in turn, purchased said goods and services directly from suppliers located outside the State of Nebraska. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Although he did not file a post-hearing brief, counsel for the Charging Party did provide me with several court decisions which, it is contended, support the legal theories underlying the allegations of the complaint. Said cases have been carefully considered.

II. LABOR ORGANIZATION

Respondent admits, and I find, that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

1. By entering into a document, dated June 30, 1971, did Respondent bind itself to the 1971–74 collective-bargaining agreement between the Union and Omaha Building Contractors Employers Association and all successor agreements and/or amendments thereto, including the existing 1980–83 collective-bargaining agreement?

2. In or about June 1980, did Respondent repudiate said existing collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act?

3. In or about June 1980, did Respondent withdraw recognition from the Union as the collective-bargaining representative of certain of its carpenter employees in violation of Section 8(a)(1) and (5) of the Act?

4. In or about June 1980, did Respondent unilaterally, without first bargaining with the Union, change its employees' terms and conditions of employment in violation of Section 8(a)(1) and (5) of the Act?

5. On or about June 30, 1980, did Respondent constructively discharge employees Robert Cantwell, Bill Meeves, Charles Hartline, Virgil Guerra, and Harley Sedivey in violation of Section 8(a)(1) and (3) of the Act?

6. In or about June 1980, did Respondent interrogate prospective employees as to their membership in the Union in violation of Section 8(a)(1) of the Act?

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The record discloses that since, at least, 1937, the Union[2] and the Omaha Building Contractors Employers Association, an organization comprising approximately 30 employers who are engaged in the building and construction industry in the State of Nebraska and existing, in part, for the purpose of representing its employer/members in collective bargaining with various labor organizations, herein called the Association, have been signatories to successive collective-bargaining agreements, covering employees in a unit encompassing journeymen and apprentice carpenters, carpenter foremen, carpenter general foremen, carpenters working on Creosote or similar type material, carpenter sawmen, carpenter welders, piledriver foremen, millwrights, millwright foremen, and millwright general foremen. The current collective-bargaining agreement between the parties was executed shortly after a month-long strike on August 4, 1980, and is effective until May 31, 1983. The record further discloses that the Union is also signatory to approximately 175 separate contracts, termed independent agreements, with other building and construction industry employers. With regard to these, based upon what can be deciphered from the somewhat confusing testimony of Eugene Shoehigh, the Union's general representative, at some point during contract renewal negotiations with the Association, the Union presents these independent agreements to the 175 non-Association member contractors. Acting as temporary agreements pending the completion of the Union-Association negotiations, these contracts are utilized "because we wanted to have a means for the employers to go ahead and work" without the omnipresent threat of a strike and either bind the signatory contractor to the terms of the expired Association contract and, ultimately, to those of the successor thereto or act as complete agreements without reference to other documents. In the latter case, according to Shoehigh, said contracts differ from the Association contracts only with respect to wages, and, upon completion of the Union-Association negotiations, the wage rates of the temporary independent agreements are modified to reflect those set forth in the Association collective-bargaining agreement.[3]

The record establishes that Respondent is a contractor in the building and construction industry in the State of Nebraska, engaged in the remodeling of both existing commercial and residential structures; that it employs mostly carpenters who work at the sites of the jobs and at an Omaha cabinet shop; and that most of said employees are long-time workers for Respondent (Hugo Oltmanns states that "I do not have much turnover. . . ."). Oltmanns is the president of the corporation, and Henry Espersen is Respondent's superintendent in charge of the cabinet shop.[4] The record further establishes that prior to June 1971, although not a signatory to any type of collective-bargaining agreement with the Union and not a member of the Association, Respondent, nevertheless, employed carpenters who were members of the Union and compensated them at the wage rates set forth in the existing Association agreements.[5] According to Hugo Oltmanns, Respondent complied with the wage provisions to the extent that it once paid to its employees retroactive wages totaling in excess of $8,000, resulting from an agreement between the Union and the Association.

On May 31, 1971, the existing Association contract expired. Negotiations between the parties resulted in impasse, and the Union's member/employees struck. Oltmanns testified that, despite the strike against the employer/members of the Association, his employees continued to work. However, one day in June, he received a telephone call from Art Deseck, a union business agent, who told Oltmanns that in order to avert a

[2] Prior to 1979 the Union was known as Omaha Carpenters District Council. In that year as a result of internal changes and requests from its membership, the Union's name was changed to that which appears in the caption herein. Moreover, all contracts between the Union and Omaha Building Contractors Employers Association were redrafted to reflect the new name of the Union. As far as can be determined from the record, other than its name, the Union as an entity remained unchanged.

[3] Prior to modification, the independent agreement wage rates correspond to the Union's last offer during negotiations with the Association. Despite Shoehigh's statement that said wage rates are eventually modified to correspond to those which the Association employer/members agree to pay, analysis of G.C. Exh. 10, an independent agreement which was presented to Respondent in June 1980, discloses that it contains no such provision signifying modification of the established wage rates.

[4] In its answer, Respondent admitted that both individuals are supervisors within the meaning of the Act.

[5] There is no record evidence regarding whether, prior to June 1971, Respondent complied with any other terms of the Association agreements, including payments to the fringe benefit trust funds.

strike by his employees, Oltmanns would have to execute an independent agreement. The latter told Deseck to bring a copy of this agreement to Respondent's office and they would "go through it and . . . I would either sign it or not sign it." Within the next few days, Deseck came to Respondent's office, and he and Oltmanns discussed the independent agreement provision by provision. Angered over his prior payment of retroactive wages, Oltmanns' only objection to the contract's terms was to a provision, requiring the signatory to pay the contractual wage rates retroactive to the effective date of the new agreement. After consulting with other union officials, Deseck agreed to expurgate the clause from the agreement. As to the duration of the contract, Deseck said it "was for the time of the [Association agreement]." This independent agreement, which was dated June 30, 1971, and executed by Oltmanns and Deseck, without the deleted language, reads as follows:

> We the undersigned, agree to work subsequent to June 1, 1971, under the following agreement:
>
> (1) We will continue to maintain current working conditions, fringe benefits and wages which were in effect prior to June 1, 1971, as per contract with the Omaha Building Contractors Employers Association or to maintain the same provisions as per contract with the Heavy Contractors Association, Inc., which were in effect prior to January 1, 1971.
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> (2) We further agree to be bound by the terms of negotiated agreements with both or either Contractors Associations during the terms of such Agreement.
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> * * * * *
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> (4) We further agree that the undersigned union may take any or all economic recourse to assure the payment of such wages, fringe benefits and cost conditions of such negotiated agreements.

Oltmanns' testimony as to the foregoing was uncontroverted.

Subsequent to Oltmanns execution of the above-described document, the Union and the Association reached agreement on the terms of a successor collective-bargaining agreement, effective until May 31, 1974. Thereafter, the parties agreed on two successive contracts, the first, effective from June 1, 1974, until May 31, 1977, and the next, effective from June 1, 1977, until May 31, 1980. Hugo Oltmanns testified, without contradiction, that, between July 1971 and June 1980, he had no contacts, verbal or otherwise, with representatives of the Union regarding the aforementioned agreements[6] and that, in fact, not only had he never been presented with copies of these three successive contracts but also he was unaware of the terms and conditions of employment contained therein. Notwithstanding this lack of knowledge and asserting that he "voluntarily" acted merely upon the word of his carpenter employees "because [they] had a union card," Oltmanns admitted that, during this time period, Respondent complied with several, if not all,[7] of the economic provisions contained in the agreements. Thus, the record reveals that Respondent paid its carpenter employees at the contractual wage rates and that said individuals received all fringe benefits, established by the contracts.[8] With regard to the latter, Oltmanns stated that the Union sent monthly forms to Respondent and notified it as to any changes in the amounts due to the various funds.[9] Besides these economic terms, the record also reveals compliance by Respondent noneconomic provisions of the successive Association collective-bargaining agreements. In line with the contractual recognition of the Union as the "sole collective bargaining agency" for carpenter employees, Charles Hartline, who had been employed by Respondent as a carpenter since 1965 or 1966, testified, without contradiction, that all carpenters who were hired by Respondent from July 1971 until June 1980 were members of the Union. Further, on at least one occasion during this time period, Respondent utilized the nonexclusive hiring hall provision of the contracts, hiring several individuals, who had been referred by the Union, for a hotel remodeling project. Also, Respondent's carpenters' work shift was identical to that set forth in the Association contracts, and they received the same standard holidays. Finally, assertedly based on the fact that "the majority of [his] people . . . were being paid as per the union's rates" rather than his use of union people exclusively, Oltmanns admitted that he considered Respondent to be a union contractor.

The June 1, 1977, through May 31, 1980, collective-bargaining agreement between the Association and the Union expired on the latter date, and, with negotiations at an apparent impasse, the carpenter employees of the Association member/employers engaged in a concerted work stoppage against their respective employers. Despite this, some of Respondent's employees continued to work and no picketing occurred at Respondent's jobsites or at the Omaha cabinet shop. On June 4, according to employee Hartline, he was told by Henry Espersen that Respondent had not yet executed any form of temporary contract. Accordingly, the next day Hartline went to the Union's office and spoke to Eugene Shoehigh, asking the latter whether there was any sort of contract so that Re-

[6] Oltmanns testified that a former employee, Lewis R. Moody, was elected the business manager of the Union and that he and Moody speak from time to time. Oltmanns denied that said conversations have anything to do with union business or Respondent's relationship to the Union.

[7] In uncontroverted testimony, Oltmanns denied ever having paid contractually mandated travel expenses or "show up" wages to carpenter employees. With regard to compensation for overtime work, the successive Association contracts provide for double time pay for such. Employee Robert Cantwell testified that he worked overtime on one occasion and that he was compensated at a double time rate for his work. Oltmanns testified that overtime work was extremely rare but that when Respondent's carpenters did work such hours, they received time-and-a-half or straight time for such.

[8] Concerning fringe benefit payments, there is no dispute that each month, during the time period July 1971 through June 1980, Respondent contributed on behalf of each of its carpenter employees specific sums of money to various construction industrywide trust funds, including a health and welfare fund, a pension fund, a holiday and vacation fund, and a training and education fund.

[9] Oltmanns denied personally being aware of changes in the fringe benefit amounts, claiming that Respondent's bookkeeper was responsible for such.

spondent's employees could continue to work. Shoehigh gave Hartline a complete collective-bargaining agreement, General Counsel's Exhibit 10, which, according to Shoehigh was a copy of the contract that the Union was seeking from the Association. Hartline testified that Shoehigh told him that Respondent's employees could work only if Oltmanns executed this contract, that Respondent would have to pay the wage rates set forth therein, and that said rates would ultimately be adjusted to conform to whatever rates were established in the new Association agreement.

Because an employee had informed him that Respondent's carpenter employees would honor the Union's strike against the employer/members of the Association and cease working, Oltmanns called a meeting with all his employees for Friday, June 6, at 7:30. a.m., in Respondent's office at the cabinet shop facility. There is little dispute as to what was said at this meeting. Thus, Oltmanns testified that he began the meeting, stating that he did not belong to the Association and that inasmuch as there were no pickets at his jobsites, he believed the carpenters could work. Next, Oltmanns said that, notwithstanding a strike, because "twice I got hooked in that and I just could not afford it," he would not pay retroactive wages to the employees. Employee Hartline then raised the matter of rumors that Oltmanns was going to make Respondent a nonunion contractor. According to Oltmanns, he replied that, due to costs, he had contemplated such a move for 2 or 3 years and that whenever he reached a final decision, he would inform the employees. He continued, saying that there were no pickets and that he could not understand why the men were not going to work. Hartline responded that he had visited the union offices, had been given a contract, and had been instructed that the employees could not work if Oltmanns did not sign it. Thereupon, Hartline gave Oltmanns the contract, which Shoehigh had given him the day before. Oltmanns glanced at it and replied that the Union had not, as yet, requested that he sign anything; that as there were no pickets, he believed the carpenters could work; and that if they did not, they should hand in their tools.

Hartline testified that Oltmanns began the meeting by stating that he could not afford to pay what the Union was demanding from the Association employer/members and that he would not pay retroactive wages even if the employees worked through the strike. Hartline then raised the matter of the contract which had been given to him by Shoehigh, stating that Oltmanns "had to sign for us to work during the strike." The latter glanced through the contract and said that the carpenters could still work as nobody was picketing the job. According to Hartline, he replied that the contract had to be executed and Respondent had to pay the wage rates therein before the men would work. Oltmanns responded that if "we wasn't [sic] going to go to work, we might as well turn in all our tools and that he was thinking of going nonunion and then when he made up his mind he would let us know which way he was going to go." Carpenter Bill Meeves recalled that Oltmanns began the meeting, saying that Respondent had a great deal of work and he hoped that the men would continue to work and that because he had done so in the past and such had cost him "too much money," he was not going to sign any agreement with the Union.[10] Next, Oltmanns said that he assumed the employees were aware of rumors that Respondent would become nonunion but that "he didn't know just quite what he was going to do yet." Thereupon, Hartline gave a copy of an agreement to Oltmanns; the latter glanced through it without comment. Then, Oltmanns announced that he was going to be in his office, that the employees could decide what they wanted to do, and that if they struck, they should leave their tools in the shop.

Carpenter Robert Cantwell testified that Oltmanns told the assembled employees that he wanted them to work, that he had much work to do, and that he felt it was permissible for the men to work. Next, Oltmanns mentioned a rumor that Respondent would go nonunion; he said that while he had thought about doing this, he had not yet decided to do so. According to Cantwell, Hartline then stated that the employees could not work unless Oltmanns signed a union contract; Oltmanns replied "that he wasn't going to sign any kind of an agreement, that he didn't need to, that we could go to work without an agreement." Oltmanns concluded the meeting, saying that while he had considered going nonunion, "he would consider it further if we didn't go back to work." Another carpenter, Virgil Guerra, recalled that Oltmanns said that he was not then going nonunion but had considered such based on "the costs and everything." He further recalled that Hartline mentioned a union document, which he had with him, saying that if Oltmanns signed it and agreed to the terms therein, the carpenter employees would be able to remain at work. Oltmanns declined to sign the document. As to the result of negotiations between the Association and the Union, Oltmanns said that he did not want to pay retroactive wages inasmuch as "in prior years . . . he said that he got stung by that method." The meeting ended with Oltmanns stating "that whether he goes union or nonunion was going to have a lot to do on how the strike turns out . . . . he just said it was up to us." At the conclusion of the meeting, after Oltmanns left the room, the employees discussed whether to honor the Union's strike and cease working. Eventually, carpenter employees Hartline, Cantwell, Meeves, Guerra, and Harley Sedivey chose to honor the strike and withheld their services from Respondent until its conclusion.[11] Further, Respondent employed three other carpenters, Roland Dean Weiderick, Jim Cross, and Jack Pearson, as of the day of this employee meeting; they continued to work during the period of the strike and beyond.[12]

[10] Meeves assumed that the reason for this refusal was based on the matter of retroactive wages.

[11] Hartline, Cantwell, Meeves, Guerra, and Sedivey are listed in Respondent's payroll records as having quit work on June 4, 1980. Another carpenter employee, Darrell Benford, is also listed as having quit on that date. The record is silent as to his union membership and as to whether he also honored the strike and withheld his services until the conclusion thereof.

[12] By their own admissions, Pearson and Weiderick were union members as of June 6. The former testified that, at some point prior to the hearing, he resigned said membership. Weiderick testified that he decided

Continued

Hugo Oltmanns testified that, based on what Hartline said at the Friday meeting with regard to working without a signed contract, on the following Monday (June 9), he (Oltmanns) telephoned the Union's office and spoke to Shoehigh. "I asked him, how come you told my men they couldn't go to work . . . I do not even have an agreement with the Union, although I have been paying the union wage." Shoehigh replied, "I think you are right about the agreement, but . . . I did not tell [Hartline] they could not go to work. . . . I told [him] that if there was a picket, they could not cross the line; if there was no picket, they had to use their own discretion." Shoehigh then said he had an agreement for Respondent which Oltmanns would have to sign. Oltmanns responded that Shoehigh should bring the document to Oltmanns and "we will look at it and go through that . . . because without reading it, I would not sign anything." Shoehigh also testified as to this telephone conversation, placing it on June 4 or 5. "During the conversation Mr. Oltmanns asked me why his people were working, and I believe I told him . . . that we were on a general strike, that his people . . . were members of [the Union], and it was up to them if they wanted to work . . . or if they did not." Oltmanns asked about "another contract," and Shoehigh mentioned that the Union had an independent agreement "and if he would sign this . . . that this would allow him to work." Oltmanns asked for a copy, and Shoehigh agreed to have one sent to Respondent's office.[13]

Immediately after the telephone conversation, Oltmanns sent the following letter to Shoehigh:

> Dear Gene:
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> This is to confirm our telephone conversation this morning as to the following:
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> Remodeling by Oltmanns, Inc. has no current contract with [the Union] and that you did not tell my men they could not work. You told them that you were on strike and if there were no pickets, they should use their own judgment.

Also after the telephone conversation, a union member delivered a contract, identical to that which Shoehigh gave to Hartline, to Respondent's office. Subsequently, Oltmanns studied but did not sign the document.

The record establishes that, a few days after the June 6 employee meeting, Respondent became an employer/member of Associated Builders and Contractors, Inc., herein called the ABC, a nonunion trade association of persons and companies in the building and construction industry. By doing so, Oltmanns considered Respondent no longer as being a union shop but rather a "merit shop," wherein, according to Oltmanns, "I was hiring [employees] for so much an hour until I found out what they could do. If they felt they were worth more after they worked for me, there was my door, come in and see me. If I did not think they were, I would say no and if I did I would give them more money." Besides changing its operational philosophy, Respondent instituted several other changes in its employees' terms and conditions of employment. Initially, during the week of June 12, employees Pearson and Weiderick received pay raises from $11.95 per hour to $12.80 per hour, approximately an 8-percent increase in pay. Next, subsequent to June 4, Respondent ceased payments to the Union's fringe benefit funds, instituted a new vacation policy, and contracted with a different health insurance carrier. Further, in mid-June, Respondent commenced paying newly hired carpenter employees between $11 and $11.50 per hour, a wage rate lower than what carpenters received prior to the June 6 work stoppage. Moreover, in instituting its merit shop system, Respondent attempted to guard against hiring union members. Thus, Oltmanns admitted interrogating at least two individuals, who were hired as strike replacements in late June, as to their union membership. Finally, Oltmanns admitted that he instituted all the foregoing changes without notifying or bargaining with the Union, stating that subsequent to his June 9 conversation with Shoehigh, he had no contacts with representatives of the Union.

The Union and the Association reached agreement on the terms of a new contract, effective until May 31, 1983, during the last weekend in June, and the strike ended. The record discloses that, pursuant thereto, early in the morning of Monday, June 30, striking employees Cantwell, Guerra, Meeves, and Sedivey[14] each went to Respondent's cabinet shop facility to ascertain his employment status with Respondent;[15] they collectively met with Oltmanns in the latter's office. According to Bill Meeves, "I asked him if we had a job, and he said . . . he'd like to keep us working, but . . . he could only afford to pay $11.50 an hour, and he said as far as benefits go he didn't have anything in mind yet, but down the road he would check on some benefits, and we didn't need a union card." At that point, according to Meeves, he and Cantwell shook hands with Oltmanns, said it had been nice working for Respondent, and left the office.[16] Cantwell testified that one of the four employees asked if the four could return to work, and Oltmanns replied, "You can go to work if you want . . . to work for $11.50 an hour . . . ." Oltmanns then informed the employees that he had joined a "non-union outfit," ABC, "and to go to work we would have to drop our union cards. We couldn't belong to the union and work for

to resign his membership in the Union when he returned to work on June 9. However, the record is unclear as to the date of his resignation and, in any event, he disclosed nothing of his intentions to Oltmanns: "I just more or less took it for granted he would know. No, I don't think I ever did say yes or no." As to Jim Cross, who left Respondent's employ on or about June 25, Oltmanns testified that he also was a union member.

[13] Although their versions are corroborative as to several aspects, I credit that of Oltmanns, believing that such appears to be more logical in the context of the sequence of events herein.

[14] Charles Hartline did not go to Respondent's office that day inasmuch as he was awaiting notification from Oltmanns as to the latter's decision whether or not to remain a union contractor. Unknown to him, Oltmanns already had made his decision and was in the process of implementing it.

[15] Late in June, Respondent hired four carpenter employees—Dennis Turnbull, Jeff Henry, Mike Hardin, and James Chessier. According to Oltmanns, each employee was informed that Respondent was a "merit shop."

[16] According to Meeves, when Oltmanns said the former did not need a union card, "I assumed that we was [sic] going to go non-union, and you didn't have to have a union card, and I wasn't going to let mine drop."

him." Corroborating Meeves, Cantwell further testified that at that point he and Meeves shook hands with Oltmanns, said they could not do what Oltmanns wanted, and left the office. Guerra, who testified that during the period of the strike he had heard rumors that Respondent had changed its status to that of a nonunion contractor, stated that Oltmanns began the meeting, saying "that he was in the process of withdrawing from the union and that we were welcome to stay with him. . . . The new rate would be $11.50 an hour and the benefit package . . . would be . . . through him . . . his own insurance . . . and not through the union." At that point, according to Guerra, Meeves and Cantwell shook hands with Oltmanns and left the office. Thereafter, Oltmanns engaged in a conversation with Guerra and Sedivey about the job. Both employees said they wanted to stay with the Union and then left the office. During cross-examination, Guerra quoted Oltmanns as saying that Respondent had become a member of the ABC, that such was a nonunion organization, and that, as to whether the four employees could retain their union cards, "He told us that he did not care if we carried a union card or not, that it was up to us."

Oltmanns also testified with regard to this June 30 meeting. At first he denied having told the returning strikers that Respondent had become nonunion. However, upon being confronted with his pretrial affidavit, Oltmanns changed his answer and admitted informing the employees that Respondent was no longer a union shop. According to Oltmanns, he also specifically informed them that Respondent had become a merit shop, that *new* employees would be paid $11 to $11.50 per hour, and that Respondent had implemented new vacation and health insurance policies. I credit the testimony of Guerra, as corroborated by Meeves and Cantwell, as to what was said at this meeting.[17] Thus, I found his account to be the most detailed and logical. In this regard, I do not credit Oltmanns' assertion that he told the employees that new employees would receive between $11 and $11.50 per hour, noting that each employee witness recalled that Oltmanns referred to this wage rate as *his* new one.[18]

That afternoon, according to Charles Hartline, Bill Meeves telephoned him and reported that there had been a meeting earlier that day in Oltmanns' office, that the latter had offered them $11.50 per hour and insurance benefits at a later date, and that Oltmanns said the returning strikers could not retain their union cards or belong to the Union any longer. Testifying that "as far as I knew [Respondent] went non-union, and I wouldn't work for a non-union company," Hartline did not contact Respondent with regard to his employment status subsequent to June 30. That Hartline's conclusion seemed justifiable to him is clear from a conversation between him and Henry Espersen later that summer. Thus, Hartline quoted Espersen as saying, "He had just mentioned that he was going to drop his card, that Mr. Oltmanns had gone non-union." Espersen was not called as a witness by Respondent.

To date, Respondent has not abided by the terms of the existing Association contract.

B. *Analysis*

The complaint alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1), (3), and (5) of the Act by refusing to abide by the 1980–83 collective-bargaining agreement between the Union and the Association; by withdrawing recognition from the Union as the collective-bargaining representative of its carpenter employees; by unilaterally, without notification or bargaining, changing the wage rates and other terms and conditions of employment of its carpenter employees; and by constructively discharging employees Cantwell, Meeves, Guerra, Sedivey, and Hartline. In support, counsel for the General Counsel argues that, by the terms of its 1971 contract, Respondent bound itself to all successors thereto, including the existing Association collective-bargaining agreement and alternatively that by adopting the terms of all Association contracts between 1974 and 1980, Respondent bound itself to said agreements and, thus, to the existing one. Next, counsel argues that Respondent recognized the Union as the collective- bargaining representative of its carpenter employees in 1971, that the Union had attained majority status, and that by proclaiming itself to be a nonunion contractor, Respondent unlawfully repudiated the Union's status. As a corollary to this last point, counsel contends that Respondent was under an obligation to bargain prior to instituting its admitted June changes in employees' terms and conditions of employment. It is further argued that by making "it impossible for employees to continue their employment and to retain union membership," Respondent unlawfully and constructively discharged employees Cantwell, Meeves, Sedivey, Guerra, and Hartline. Finally, counsel contends that Oltmanns' admitted interrogation of Respondent's newly hired strike replacements with regard to the union membership was violative of the Act. Contrary to the General Counsel, Respondent contends that it has not bound itself to the existing Association contract; that the Union was never recognized in 1971 as the majority representative of its carpenter employees by Respondent; that, therefore, no bargaining obligation existed in June 1980; that Respondent did not constructively discharge employees on June 30; and that inasmuch as the admitted June employee interrogations were isolated, such were not coercive and, thus, not unlawful.

Analysis of the continuing effect, if any, of the June 30, 1971, agreement between Respondent and the Union must, at the outset, focus upon exactly what the Union sought to accomplish by such a document. In this regard, I note that the first paragraph binds the signatory contractor to continue to abide by the terms and conditions of employment of the *expired* Association collec-

[17] Specifically noting the contradictory testimony of Meeves and Cantwell concerning their union cards, I rely upon Guerra's testimony that Oltmanns "did not care" what the employees did about them.

[18] The crediting of a portion of Oltmanns' testimony and the discrediting of another are required under the circumstances of this case and do not require rejection of his entire testimony. *Caffe Giovanni, Inc. d/b/a Giovanni's*, 259 NLRB 233 (1981); *Carolina Canners, Inc.*, 213 NLRB 37 (1974). "Nothing is more common than to believe some and not all of what a witness says." *Edwards Transportation Company*, 187 NLRB 3, 4 (1970), enfd. 437 F.2d 502 (5th Cir. 1971).

tive-bargaining agreement and that the second paragraph binds said contractor to the result of negotiations between the Association and the Union during the aforementioned interim period—presumably a successor collective-bargaining agreement. There are no terms and conditions of employment set forth in the document, and Shoehigh testified that such is utilized during the pendency of a strike to ensure that the signatory employer's employees continue to work. Accordingly, this particular agreement must have been meant by the Union to have the same effect as standard "truly interim, temporary agreements"—of the type approved by the Supreme Court in *Charles D. Bonanno Linen Service, Inc.* v. *N.L.R.B.*, 454 U.S. 404 (1982)—by which "both the union and the employer executing the interim agreement [are] bound by any settlement resulting from multiemployer bargaining." Counsel for the General Counsel interprets the document as having far greater significance and effect, terming it a "memorandum agreement" similar to those considered by the Board in *New York Typographical Union No. 6 (Clark & Fritts, Inc.)*, 236 NLRB 317 (1978); *Ted Hicks and Associates, Inc.*, 232 NLRB 712 (1977); and *Phoenix Air Conditioning, Inc.*, 231 NLRB 341 (1977), asserting that the June 30, 1971, agreement bound Respondent to "the results of all future negotiations between [the Union and the Association]" inasmuch as said agreement "did not contain any express provisions regarding its termination." I do not agree.

Initially, rather than the limiting language contained in the document herein involved, the memorandum agreements, in each of the relied-upon cases, bind the contractor to an existing multiemployer collective-bargaining agreement and to "all succeeding [contracts] negotiated between the union and the contractors association." (*Phoenix Air Conditioning, supra*); to "'any modifications, extensions, or renewals' of that contract" (*Ted Hicks, supra*); and to "any amendments, modifications, supplements, renewals, and extensions thereof." (*Clark & Fritts, Inc., supra* at 318.) In the view of the Board, this type of language has the effect of placing the signatory contractor on notice that its contractual relationship with a union is a continuing one, governed by future modifications of an existing or about-to-be negotiated multiemployer agreement. *Ted Hicks, supra* at 713. Such cannot be inferred from the language of the agreement herein which is conspicuously silent as to subsequent Association contracts, and it was uncontroverted that, when he executed the June 30, 1971, agreement, Oltmanns was informed by union official Deseck that he (Oltmanns) was only agreeing to be bound by the *next* Association agreement and that the duration of the document "was for the time of the [Association agreement]." Secondly, in *Ted Hicks, supra*, the Board concluded that, absent express termination[19] dates in the memorandum agreement at issue, those of the multiemployer contract must be incorporated into the former document. Accordingly, as the parties to the multiemployer contract had reached agreement on a successor thereto, as neither the respondent nor the union gave the requisite notice to terminate the memorandum agreement and negotiate a separate one, and as the respondent had, in the memorandum agreement, signified its intent to establish a continuing contractual relationship with the union governed by the results of multiemployer bargaining, the respondent therein was held to be bound to the existing multiemployer contract. The fact that the memorandum agreement contained no express termination dates holds no significance beyond the foregoing. Herein, there is no basis for concluding that the Union and Respondent entered into any sort of contractual relationship intended to last beyond the expiration date of the next Association contract—May 31, 1974. Even assuming the termination dates of that agreement should be incorporated into the interim agreement between the parties, neither the Union nor Respondent gave the requisite notice to open new negotiations; thus, their written contractual relationship expired on May 31, 1974. Based on the foregoing, as I believe the June 1971 agreement was meant only to be a temporary, interim agreement and not to signify any continuing contractual relationship, I reject the contention of the General Counsel that its terms somehow bound Respondent to the 1980–83 Association contract and shall recommend that paragraph 10(a) of the complaint be dismissed.[20]

While I do not believe that any continuing written *contractual* relationship beyond May 31, 1974, was effectuated, I do believe that a continuing *bargaining* relationship resulted from the June 30, 1971, agreement between Respondent and the Union. Thus, I further believe that,

[19] In *Ted Hicks, supra*, the Board explained that "termination" does not signify the cessation of relations between the parties. Rather, it marks the start of negotiations for a new successor agreement. *Id.* at 714.

[20] Counsel for the General Counsel alternatively argues that Respondent's conduct subsequent to May 31, 1974, of, in effect, "adopting" the terms of successive successor Association contracts signified its intent to be bound by said agreements and, thus, bound Respondent to accept the terms of the 1980–83 Association collective-bargaining agreement. In so contending, counsel relies upon numerous Board cases, including *Fitzpatrick Electric, Inc.*, 242 NLRB 739 (1979); *Haberman Construction Company*, 236 NLRB 79 (1978), enfd. 618 F.2d 288 (5th Cir. 1980), modified 641 F.2d 351 (5th Cir. 1981); *Vin James Plastering Company*, 226 NLRB 125 (1976); and *Marquis Elevator Company, Inc.*, 217 NLRB 461 (1975). I note, initially, that whether an employer has "adopted" a collective-bargaining agreement is purely an issue of fact, and each case in this area of the law must be decided upon its *own* merits. *Haberman Construction, supra* at 85. However, assuming *arguendo* the validity of the General Counsel's assertion *vis-a-vis* Respondent's conduct with regard to the Association's 1974 to 1977 and 1977 to 1980 contracts, I do not agree with the conclusion that Respondent, therefore, bound itself to the 1980–83 agreement. Thus, analysis of each of the cited cases and others discloses that the Board is typically concerned with an existing agreement with which an employer initially complies but subsequently repudiates prior to expiration. In such circumstances, the Board examines the extent of the respondent's compliance, and if such signifies that the contract's terms have been adopted by said employer, the Board concludes that said respondent has bound itself to the contract. Thus, the Board orders the employer to abide by the terms of the agreement.

Utilizing this theory, the Board has further concluded that a bargaining obligation exists as to future contracts but has *never* held that an employer, which has adopted an existing agreement, thereby binds itself to the specific terms of a future contract about which it has not bargained and with which it has not complied. In fact, the Board has made clear that an employer "need not honor any such agreement unless it agrees to do so after bargaining with the Union." *Haberman Construction, supra* at 79, fn. 2. Herein, there is no evidence of any bargaining between the parties, and no evidence that Respondent complied with any term of the 1980–83 Association contract. Accordingly, I do not find that it has, in any way, adopted or manifested any intent to be bound by said agreement, and I cannot order such. *Gregory's Inc.*, 242 NLRB 644 (1979) (the Board's order therein); *Haberman Construction, supra.*

by entering into said document, Respondent recognized—and continued to recognize—the Union as the bargaining representative of its carpenter employees, that subsequent to this initial recognition, the Union achieved a status as the majority representative of said employees, and that by instituting its admitted unilateral changes in the terms and conditions of employment of the carpenter employees and by withdrawing recognition from the Union as the majority collective-bargaining representative of these individuals, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act. At the outset, there is no record evidence that the Union was the majority representative of Respondent's carpenter employees at the time Respondent entered into the June 30, 1971, contract. However, Respondent concedes that it is an employer in the building and construction industry, and Section 8(f) of the Act[21] makes it lawful for construction unions to request and obtain recognition without first establishing majority status. *Albuquerque Insulation Contractor, Inc., Employer-Petitioner*, 256 NLRB 61 (1981). Respondent contends that the June 30, 1971, document was not a recognition agreement, pointing out that there is no reference therein to a grant of recognition by Respondent to the Union. While counsel for Respondent is correct that the word "recognize" does not appear in the agreement, Respondent bound itself to continue to maintain the existing working conditions established by the most recent Association contract and to accept the "terms" of the next Association contract. Article 1(a) of said agreements grants recognition to the Union as the "sole bargaining agency" for carpenter employees. Moreover, Hugo Oltmanns impressed me as being an extremely intelligent individual and a "hard-nosed" businessman, who would not enter into an agreement without knowledge as to what he was agreeing or the potential consequences flowing therefrom. Accordingly, I conclude that Oltmanns knew, full well, that by entering into the June 30, 1971, contract, he was extending recognition to the Union as the collective-bargaining representative of his carpenter employees.

It is clear Board law that when a union, originally recognized under Section 8(f), subsequently achieves majority status among employees who make up a permanent, stable work force, the employer is then under the statutory duty to recognize and bargain with the Union as the employees' exclusive representative. *Construction Erectors, Inc.*, 252 NLRB 319 (1980); *Precision Striping, Inc.*, 245 NLRB 169 (1979), reversed on other grounds 642 F.2d 1144 (9th Cir. 1981). Herein, there can be no doubt that subsequent to June 30, 1971, the Union obtained majority status among Respondent's carpenters to the extent that, in mid-June 1980, at least eight, if not all nine, of said employees were members of the Union. Thus, in the time period July 1, 1971, through June 6, 1980, Respondent, on at least one occasion, utilized the Union's nonexclusive hiring hall in order to hire carpenters and it was uncontroverted that all other carpenters, hired during this period, were members of the Union. Moreover, of the nine carpenters employed by Respondent as of June 6, 1980, Charles Hartline, Virgil Guerra, Robert Cantwell, Bill Meeves, Harley Sedivey, Roland Dean Weiderick, Jack Pearson, and Jim Cross were members of the Union. Finally, Hugo Oltmanns testified that his carpenters were longtime employees, several having been employed by Respondent for many years—"I do not have much turnover." In these circumstances, I find that subsequent to June 30, 1971, and certainly by June 6, 1980, the Union had achieved majority status in a stable unit of Respondent's carpenter employees and that, at least, by June 6, 1980, the tenents of Section 9(a) of the Act applied to the bargaining relationship between the Union and Respondent. *Carrothers Construction Company, Inc.*, 258 NLRB 175 (1981); *Construction Erectors, Inc., supra.*

As to the aforementioned bargaining relationship, the record warrants the conclusion that, despite the absence of a signed collective-bargaining agreement subsequent to May 31, 1974, such a relationship existed and flourished until June 1980. Thus, during this 6-year period, Respondent honored most of the economic and several of the noneconomic provisions of the Union's successive collective-bargaining agreements with the Association, despite the fact that Hugo Oltmanns never saw copies of these agreements. This continued adherence to contractual terms demonstrates "the existence of a continuing relationship between Respondent and the Union." *Gregory's Inc., supra* at 646; *Manor Research, Inc.*, 165 NLRB 909 (1967). Also, at all times, Respondent considered itself to be a union contractor. In this regard, I note that Respondent never disavowed its bargaining relationship with the Union and I do not accept Oltmanns' less than candid explanation—that he meant only that Respondent paid the Union's prevailing wages and fringe benefits and nothing more.[22] Finally, the fact that Oltmanns had no contact with union officials subsequent to June 30, 1971, is of little significance inasmuch as, by Oltmanns' own admission, Respondent honored virtually all consequential provisions of the Union's contracts with the Association and instituted all requested changes in fringe benefits contributions. In these circumstances, there really

[21] Sec. 8(f) carved out an exception to the general rule requiring majority status as a prerequisite to recognition. Specifically, Sec. 8(f) provides that:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement . . . *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

[22] I base this conclusion on two factors: the fact that Respondent joined the ABC in mid-June 1980 and the fact that Oltmanns interrogated prospective strike replacements in late June as to their union membership. With regard to the first, if Oltmanns truly equated being a union contractor only with paying union economics, Respondent might well have instituted the admitted unilateral changes without joining a nonunion contractors association. As to the latter, not only do I believe that such constitute violations of Sec. 8(a)(1) of the Act, and so find, but also that the interrogations reflect the efforts by Oltmanns to ensure that the Union would eventually lose its majority status among Respondent's carpenters.

was no need for contact between the parties to effectuate the bargaining relationship.

To reiterate the substance of the foregoing discussion, I have concluded that, at least by June 6, 1980, the Union was the majority representative, for purposes of collective bargaining, of Respondent's carpenter employees. On that day Oltmanns met with these individuals and informed them that he saw no reason why they were required to honor the ongoing strike against the employer/members of the Association, that he would not be able to afford portions of the settlement reached by the Union and the Association, and that he was in the process of determining whether Respondent would revert to the status of a nonunion contractor. While there is no record evidence of their precise reasons for doing so, subsequent to this meeting five carpenter employees (Cantwell, Hartline, Meeves, Guerra, and Sedivey) chose to withhold their services from Respondent until the conclusion of the Association strike. Within the next few days Respondent repudiated the status of the Union, withdrawing recognition from it and converting in status to, in Oltmanns' words, a "merit shop" and, without notice to or bargaining with the Union, changing the terms and conditions of employment of its carpenters by reducing the wage rates of newly hired employees, increasing the wage rates of incumbent carpenters, and instituting new insurance and vacation plans. As to the former, inasmuch as at the time the Union represented a majority of the employees in a stable and permanent unit of Respondent's carpenter employees, Respondent was under a statutory duty to recognize the Union's status as such and was not free to withdraw recognition from it. *Hageman Underground Construction; Hageman Construction Company, Inc.; Hageman Engineering, Inc.*, 253 NLRB 60, 63 (1980). With regard to the uncontroverted and admitted unilateral changes, the record establishes that prior to June 1980, Respondent, pursuant to its "continuing relationship" with the Union, voluntarily complied with and/or adopted not only the wage rate and fringe benefits provisions but also significant noneconomic terms, including, for all practical purposes, the recognition clause of the successive Association agreements and that, in this manner, became bound to the terms and conditions of employment established by said contracts as if it had negotiated such independently with the Union. *Gregory's Inc., supra* at 646; *Fitzpatrick Electric, supra.*[23] Clearly, then, Respondent was under the same duties and obligations as any employer bound to a collective-bargaining agreement with a labor organization and, upon expiration of the most recent Association contract and at a time when no impasse existed between the Union and Respondent,[24] the latter could not, without giving notice and an opportunity to the Union to bargain, unilaterally rescind, modify, or alter the existing terms and conditions of employment of the carpenter employees. *Henry Cauthorne, an Individual, t/a Cauthorne Trucking*, 256 NLRB 721 (1981); *Southern Newspapers, Inc., d/b/a The Baytown Sun*, 255 NLRB 154 (1981); *Dial Tuxedos, Inc.*, 250 NLRB 476 (1980). Therefore, by repudiating its relationship with the Union and becoming a "merit shop" and by instituting the aforementioned unilateral changes, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

The General Counsel next alleges that, notwithstanding that employees Cantwell, Meeves, Guerra, and Sedivey seemingly "quit" on June 30, they were actually constructively discharged by Respondent in violation of Section 8(a)(1) and (3) of the Act. Crediting the testimony of Guerra, as corroborated by Cantwell and Meeves, I conclude that during his meeting with the four returning strikers that morning Oltmanns informed them that he was in the process of withdrawing recognition from the Union; that Respondent had become a member of the ABC, a nonunion contractors association; that if they returned to work, each would earn $11.50 per hour;[25] and that he was instituting his own insurance plan rather than using the Union's health insurance plan. Moreover, Oltmanns himself admitted informing the employees that Respondent had become nonunion during their absences. Faced with the foregoing changes in their terms and conditions of employment, the four strikers chose not to return to work. In analyzing whether said employees were, in fact, constructively discharged by Respondent, it must be borne in mind that a constructive discharge is not a discharge at all but a quit which the Board treats as a discharge because of the circumstances which surround it. *ComGeneral Corporation*, 251 NLRB 653 (1980). Normally, such situations arise in two factual contexts. In the first, with knowledge of its employees' participation in union or other protected concerted activities, an employer harasses the individual to the point that his job conditions become intolerable and, as a result, the employee quits. In such circumstances, a nexus between the working conditions and the individual's protected activities must be shown and the imposed burdens must be intended to cause an altering of the worker's working conditions. If both factors are present, a constructive discharge will be found. *Palby Lingerie, Inc. and Argus Lin-*

[23] Respondent relies on *Noriega Industries Incorporated d/b/a Pioneer Printers*, 201 NLRB 900 (1973), as support for its argument that Respondent never manifested any intent to, and did not, adopt the terms of the 1974–77 and 1977–80 Association contracts with the Union so as to be bound by them. I do not agree and believe *Pioneer Printers* is distinguishable from the instant case. Thus, in the former, the Board was concerned with the rights of a successor employer, particularly its right not to honor a predecessor's collective-bargaining agreement with a union. Also, the Board was concerned with whether the successor employer had properly withdrawn from a multiemployer bargaining group. Viewed in the foregoing posture, *Pioneer Printers* bears no similarity to the instant situation. Respondent further argues that, in following the Union's wage rates from 1974 to June 1980, Respondent was doing no more than what it did prior to 1971. However, there is no record evidence that Respondent did more than pay prevailing wages in the years prior to 1971. In the subsequent period, Respondent's adherence to the Union's terms and conditions of employment was substantially more pronounced.

[24] Although not specifically argued by Respondent, the fact that the Association and the Union may have reached a good-faith impasse in their negotiations was not controlling upon the relationship between the Union and Respondent. Thus, inasmuch as it was never an Association member, no impasse existed between Respondent and the Union. Moreover, the former's relationship with the Union was a separate one, based on the 1971 contract.

[25] I am satisfied that, while Oltmanns may not have actually been paying his journeyman carpenters at an $11.50-per-hour wage rate, his fabrication was calculated to dissuade the strikers from returning to work. As with the interrogations of the strike replacements, I believe Respondent was attempting to rid itself of union employees.

gerie Corp., 252 NLRB 176 (1980); *Maywood, Inc.*, 251 NLRB 979 (1980); *Lyman Steel Company*, 249 NLRB 296 (1980); *General Meats, Inc.*, 247 NLRB 1036 (1980); *Crystal Princeton Refining Company*, 222 NLRB 1068 (1976). In the second factual situation, an employer confronts an employee with the Hobson's choice of either continuing to work or foregoing the rights guaranteed to him under Section 7 of the Act. In such a circumstance, his choice must be clear and unequivocal and not left to inference. *J. J. Security, Inc.*, 252 NLRB 1290 (1980); *Henry A. Young, d/b/a Columbia Engineers International*, 249 NLRB 1023 (1980); *Martin Arsham Sewing Co.*, 244 NLRB 918 (1979); *Superior Sprinkler, Inc., and William Augusto d/b/a William Augusto Fire Protection Services*, 227 NLRB 204 (1976); and *Marquis Elevator Company, Inc.*, 217 NLRB 461 (1975).

The facts herein involved are similar to those in three other Board cases. In *Superior Sprinkler, Inc., and William Augusto d/b/a William Augusto Fire Protection Services, supra*, the respondent unlawfully refused to bargain with and withdrew recognition from a union. Thereupon, it announced to employees that it was going nonunion and, as a result, employees "quit." The Board concluded that the respondent "offered its employees the choice of accepting the employer's unlawful repudiation of its statutory bargaining obligations and working under unlawfully imposed conditions of employment or quitting their employment," and that "forcing employees to make such a choice . . . 'discourages union membership almost as effectively as actual discharge.'" *Id.* at 210. In *Haberman Construction, supra*, the Board concluded that employees quit based on their employer's decision to go "open shop" and no longer pay the union mandated fringe benefits and that such imposed "intolerable" working conditions upon their jobs so as to convert the quits to constructive discharges. 236 NLRB at 86. Finally, in *S. Freedman Electric, Inc.*, 256 NLRB 432 (1981), the employer informed employees that respondent was becoming nonunion, that it would no longer recognize the union, and that they could remain employees ". . . on Respondent's unilaterally imposed terms . . . or [leave] . . . ." The Board concluded that such constituted intolerable changes in working conditions which had the clear effect of discouraging union membership. *Id.* at 440–441 (discharges of Ingersoll, *et al.*). This case is, of course, almost identical to the foregoing. Thus, Oltmanns informed employees that he was withdrawing recognition from the Union, joining a nonunion association, reducing employee wages, and instituting his own benefits. Clearly, the four returning strikers were faced with a very real Hobson's choice: continuing to work and thereby giving up their Section 7 rights or quitting. Contrary to Respondent, I conclude that, in these circumstances, the alleged "voluntary cessations of work" by Cantwell, Meeves, Guerra, and Sedivey were, in reality, constructive discharges in violation of Section 8(a)(1) and (3) of the Act. *Freedman Electric, supra; Haberman Construction, supra; Superior Sprinkler, supra.*

The matter of Charles Hartline presents different considerations inasmuch as he voluntarily chose not to report for work on June 30, awaiting word from Oltmanns whether Respondent would remain a union contractor. However, I believe he also was constructively discharged by Respondent in violation of Section 8(a)(1) and (3) of the Act. Thus, while not attending the meeting that day, he was informed immediately after by employee Meeves that Respondent had gone nonunion, and ". . . I wouldn't work for a non-union company." This fact was confirmed for Hartline by Henry Espersen in August 1980 when the latter informed Hartline that he (Espersen) intended to relinquish his union card because Oltmanns had gone nonunion. Accordingly, while true that Hartline never was confronted by Oltmanns with the choice of working on a nonunion basis or quitting, given the foregoing, such appears to have been a useless and unnecessary requirement. Further, the record warrants the inference that Oltmanns meant that his terms for permitting the strikers to return to work be transmitted to Hartline. In these circumstances, Hartline clearly was aware of his choices and was as much the subject of a constructive discharge as the four returning strikers on June 30. *J. J. Security, Inc., supra* at 1293.

CONCLUSIONS OF LAW

1. Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All journeymen and apprentice carpenters, carpenter foremen, carpenter general foremen, carpenters working on Creosote or similar type material, carpenter sawmen, carpenter welders, pile drivers, pile driver foremen, millwrights, millwright foremen, and millwright general foremen employed by Respondent at its jobsites and at its cabinet shop; excluding all office clerical and professional employees, guards, and supervisors as defined by the Act.

4. At all times material herein, the Union has been, and is now, the exclusive bargaining representative of all the employees in the above-described appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from, and thereby repudiating its obligation to bargain with, the Union, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

6. By unilaterally, without affording the Union an opportunity to bargain, changing the terms and conditions of employment of its carpenter employees, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

7. By causing the discharge of employees Hartline, Cantwell, Meeves, Guerra, and Sedivey in order to discourage membership in the Union, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

8. By interrogating prospective employees as to their membership in the Union, Respondent interfered with, coerced, and restrained employees in the exercise of

rights guaranteed by Section 7 of the Act and, thereby, engaged in conduct violative of Section 8(a)(1) of the Act.

9. Unless specifically found, Respondent engaged in no other unfair labor practices.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. I have found that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union as the collective-bargaining representative of its carpenter employees. As a remedy, I shall require Respondent to recognize and bargain in good faith, upon request, with the Union. In addition, inasmuch as I also have found that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing employees' terms and conditions of employment, I shall require Respondent to revoke, upon the Union's request, any or all of its unilateral changes which were implemented commencing in mid-June 1980 to make contributions, retroactive to June 4, 1980, and at the rates then in effect, on behalf of its carpenter employees to the Union's fringe benefits funds; and to otherwise, retroactive to mid-June 1980, continue in full force and effect all the then current terms and conditions of employment[26] until such time that it reaches agreement or bargains to good-faith impasse with the Union or the latter refuses to bargain on such matters.[27] If agreement is reached, it shall be embodied in a signed agreement. Further, I shall order that all unit employees, hired after mid-June 1980, be made whole as a result of Respondent's failure to apply to them the terms and conditions of employment which were in effect in mid-June 1980. Finally, the question of interest and other additional amounts payable into the Union's fringe benefits funds as part of this "make whole" remedy will be left to the compliance stage of this proceeding.

I have also concluded that employees Hartline, Meeves, Cantwell, Sedivey, and Guerra were constructively discharged by Respondent on or about June 30, 1980, in violation of Section 8(a)(1) and (3) of the Act. Accordingly, I shall order that Respondent offer to each employee immediate and full reinstatement to his former position of employment or, if said position no longer exists, to a substantially equivalent one, without prejudice to any rights and privileges to which he may be entitled. I shall further recommend that Respondent be ordered to make each employee whole for any loss of earnings, including fringe benefit contributions or insurance losses, subject to verification, he may have suffered as a result of the discrimination by payment to him of the amount he normally would have earned from the date of his termination, June 30, 1980, with backpay to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as described in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[28]

The Respondent, Remodeling by Oltmanns, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively, upon request, concerning rates of pay, wages, hours, and other terms and conditions of employment with Carpenters Local Union No. 400, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union, as the exclusive representative for purposes of collective bargaining for employees in the following unit:

> All journeymen and apprentice carpenters, carpenter foremen, carpenter general foremen, carpenters working on Creosote or similar type material, carpenter sawmen, carpenter welders, pile drivers, pile driver foremen, millwrights, millwright foremen, and millwright general foremen employed by Respondent at its jobsites and at its cabinet shop; excluding all office clerical and professional employees, guards, and supervisors as defined by the Act.

(b) Discouraging membership in, or activities on behalf of, the Union by causing the discharge of employees who are members of the Union.

(c) Unilaterally, without notice to or bargaining with the Union, changing the terms and conditions of employment of the aforementioned employees.

(d) Interrogating prospective employees as to their membership in the Union.

(e) In any like or related manner interfering with, coercing, or restraining employees in the exercise of their Section 7 rights.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain with the above-named labor organization as the exclusive representative of all the employees in the unit above with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon the Union's request, revoke any or all unilateral changes made effective by Respondent on and after

[26] Such should not be construed to authorize Respondent, in any way, to revoke or otherwise retrieve any wages or other benefits which are greater than those in effect in mid-June 1980.

[27] If any employee suffered losses as a result of Respondent's unilateral changes with regard to payments to the fringe benefits funds, Respondent is ordered to reimburse said individuals in any amount not covered by other funds or insurance policies, provided that such amount shall not exceed what the employee would have received pursuant to the Union's plan.

[28] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

June 9, 1980, with regard to the wages, hours, and other terms and conditions of employment of all employees in the appropriate unit described above.

(c) Give retroactive effect to all the terms and conditions of employment in effect as of June 6, 1980, until such time that Respondent and the Union reach good-faith impasse, execute a collective-bargaining agreement, or the Union refuses to bargain in good faith with respect to such matters.

(d) Offer to employees Charles Hartline, Robert Cantwell, Bill Meeves, Virgil Guerra, and Harley Sedivey immediate and full reinstatement to their respective former positions of employment, without loss of seniority or privileges, discharging, if necessary, other employees who may have been hired or assigned to perform their functions; or, if their former respective positions do not exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(e) Make whole the employees specified in paragraph 2(d), above, and all unit employees hired on or after June 9, 1980, for any losses of pay each may have suffered, respectively, either as a result of the discrimination against each of them or because of Respondent's failure to apply to them the terms and conditions of employment in effect on June 6, 1980, in the manner set forth above in the section entitled "Remedy."

(f) Pay to the appropriate trust funds the contributions required as of June 4, 1980, to the extent that such contributions have not been made or that the employees have not otherwise been made whole for their ensuing medical and other expenses, and continue such payments until Respondent negotiates in good faith with the Union to an agreement, or to good-faith impasse, or until the Union refuses to bargain.

(g) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, work schedules, production reports and data, social security payment records, timecards, personnel records and reports, and all other records and entries necessary to determine Respondent's compliance with this Order and the amount of backpay and other sums and benefits due under the terms of this Order.

(h) Post at its place of business in Omaha, Nebraska, copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that the portion of the complaint which alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to abide by the Association's 1980–83 collective-bargaining agreement be dismissed.

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[29] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."